Supreme Court, U.S.
FILED
JUN 24 2004

No. 031721

In The

Supreme Court of the United States

LUCRETIA G. VINTILLA,

Petitioner,

v.

CITY OF ROCKY RIVER, OHIO, R. BIRD,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a 12 (b) (6) Federal Rules of Civil Procedure motion to dismiss a complaint for failure to state a claim for relief may be converted into a motion for summary judgment and disposed of as provided in Rule 56 where the record is devoid of matters outside the pleadings containing such facts as would be admissible in evidence to show that there is no genuine issue for trial as required by Rule 56?

2. Where the district court failed to give petitioner either notice of the conversion of a Rule 12 (b) (6) motion into one for summary judgment or an opportunity to respond, did the lower court commit prejudicial error in ruling that the district court properly granted summary judgment for the respondents and in affirming the dismissal of the complaint?

3. Whether procedural due process will support a Section 1983 claim against a police officer whose false charge in a sworn complaint caused an insurance company to cancel the automobile accident policy of its insured and to substitute a new policy at a substantial increase in the premium?

4. Whether substantive due process will support a Section 1983 claim against a police officer who falsely charged a person in a sworn complaint of a violation of the law and implicated the latter in a criminal prosecution which was dismissed before trial?

5. Whether respondent City is liable for the unlawful behavior of a police officer when he acts in a law enforcement capacity as a member of its police department?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are those set forth in the caption of the case, to wit: Lucretia G. Vintilla, City of Rocky River, Ohio, R. Bird and Rocky River Police Department.

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OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are unreported and appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 2004. A petition for rehearing was denied on April 15, 2004, and this petition for certiorari was timely filed. The Court's jurisdiction is invoked under 28 U. S. C., Section 1254 (1).

CONSTITUTIONAL STATUTORY PROVISIONS AND FEDERAL RULE INVOLVED

Fifth and Fourteenth Amendments to the Constitution. Title 42 U.S.C., Sections 1983 and 1985. Rule 12 (b) (6) of the Federal Rules of Civil Procedure. They appear in the appendix.

STATEMENT OF THE CASE

Petitioner instituted a civil rights action in the district court to vindicate the deprivation of her constitutional rights under the Fifth and Fourteenth Amendments to the Constitution pursuant to Sections 1983 and 1985 of Title 42 of the United States Code and the jurisdictional counterpart, 28 U.S.C., Sections 1331 (a) and 1343 (3). The suit was filed against respondents - City of Rocky River, Ohio, the Police Department of the City and police officer, R. Bird.

The genesis of the instant suit is the unlawful behavior of respondent, R. Bird (hereafter "Bird") in filing a sworn complaint containing a false charge against the petitioner which subjected her to criminal prosecution that was eventually dismissed by Bird prior to trial.

The established material facts are undisputed in the record. They show the following:

On December 10, 2000, at or about 10:56 a.m., an automobile owned and driven by the petitioner going south on Wooster Road in Rocky River, Ohio, was suddenly struck by another vehicle proceeding in the same direction after she had given the appropriate right turn signal and made a right turn from the curb lane into the parking lot of a church, her ultimate destination. After the exchange by the parties of the requisite information relative to the accident, they each moved their respective vehicle from the position in which they appeared at the time of the collision to clear the entrance to the church parking lot. Subsequently, Bird, a police officer of the Rocky River Police Department, appeared at the scene of the accident. The latter first talked to the other party to the accident, and then to the petitioner, who protested her innocence for the accident. Nonetheless, Bird told her and insisted that she was at fault for the accident. He did not cite her for a violation of the law, and told her she would soon be hearing from a magistrate. There was no witness to the accident other than the parties.

Petitioner did not hear from anyone regarding the accident. However, shortly thereafter, she received a Summons in Lieu of Warrant commanding her to appear before a Judge of the Rocky River Municipal Court to plead to the charge that she violated Section 311.11 (a) of the city Traffic Code and thereby caused the accident.

The Summons requiring petitioner to appear in court to answer the aforesaid charge was provoked by and based upon the sworn complaint executed by Bird. In response to the summons, petitioner appeared in court with counsel and entered a plea of not guilty. The case was set for trial on a day certain. On the trial date, petitioner appeared with her lawyer, prepared to defend against the charge. While awaiting the call to trial, petitioner was approached by Bird, and after a discussion, the latter agreed to dismiss and did dismiss the complaint.

Petitioner attempted to meet with the City prosecutor prior to the trial date to discuss the case, but without avail. Petitioner's counsel then wrote a letter to the Prosecutor setting forth his concerns regarding Bird's behavior in connection with the accident. He requested a meeting with the Prosecutor to inform him of Bird's conduct, and wrote, "You will agree, I believe, that the consequences to my client could be grave if the official's conduct is invalid." A similar letter was sent to the City's Law Director. There was no response from either of them, or from any other source. Petitioner then filed a motion to dismiss the complaint, supported by appropriate affidavit and brief. A copy was sent to the prosecutor, Law Director and to the presiding judge. The motion was not challenged. The judge did not rule on the motion or otherwise communicate with counsel.

As a result of the sworn complaint and the criminal proceedings that ensued, petitioner's automobile insurance company declared petitioner "at fault" for the accident, cancelled the insurance policy and subsequently issued another policy at a substantial increase in the premium.

The petitioner filed the instant action in the district court, followed by a motion for summary judgment, accompanied by a supporting affidavit and other appropriate evidence. The respondents filed a motion to dismiss the

complaint and a brief, but did not respond to petitioner's motion for summary judgment as required by Rule 56, Federal Rules of Civil Procedure.

The district court denied petitioner's motion for summary judgment and granted respondents' motion to dismiss the complaint.

On appeal, the Sixth Circuit, in a short order, declared: "Upon review, we conclude that the district court properly granted summary judgment in favor of Bird because he is entitled to qualified immunity." The application for rehearing was denied.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 delineates the considerations used by this Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States Court of Appeals has decided an important question of federal law...that conflicts with relevant decisions of this Court." Another consideration is that a "United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same matter"...Finally, the Court considers whether the Court of Appeals decision "has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power..."

All of these considerations are present in this case. The mandatory requirements of Rule 12 (b) (6), Federal Rules of Civil Procedure raise important questions of federal law. The lower court's decision that the district court properly granted summary judgment in favor of Bird under Rule 12 (b) (6) was reached in defiance of the undisputed material facts in the

record and in direct conflict with the decisions of this Court in Celotex v Cabrett, 422 U.S. 317, 326, Carter v Stanton, 405 U.S. 669, the Sixth Circuit's established rule set forth in Salehpour v University of Tennessee, 169 F. 3d 199, and with decisions of other circuit courts that interpreted Rule 12 (b) (6). The lower court's treatment of the other substantive issues raised on appeal by petitioner as moot, by reason of its grant of summary judgment under Rule 12 (b) (6), is such a departure from the usual course of judicial proceedings that the Court should exercise its supervisory powers. Finally, review is warranted to provide guidance to the lower courts in applying the requirements of Rule 56 (c) to the grant of a summary judgment pursuant to Rule 12 (b) (6), Federal Rules of Civil Procedure.

The Court's review is warranted for all these reasons.

I. Review Is Warranted Because The Lower Court's Decision Conflicts With Relevant Decisions Of This Court, With The Established Rule Of The Sixth Circuit And With The Decisions Of Other United States Court Of Appeals On The Proper Use of Summary Judgment Under A Rule 12 (b) (6) Motion To Dismiss.

The lower court held: "Because the record contained material outside the pleadings, which the district court did not exclude from consideration, the district court properly characterized the defendants' motion to dismiss as a motion for summary judgment. See Federal Rules of Civil Procedure 12 (b) (citations omitted.)"

Rule 12 (b) (6) provides that a motion to dismiss for failure to state a claim for relief may be treated as a motion for summary judgment and disposed of as provided in Rule 56 if "matters outside the pleadings are presented to and not

excluded by the court." The Rule also contains the caveat that "all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

The district court failed to give the petitioner reasonable notice of the conversion of the Rule 12 (b) (6) motion into one for summary judgment or an opportunity to respond to the said motion. Nonetheless, the lower court held that the district court properly granted summary judgment for the respondents. It should be noted that the district court did not enter an order granting summary judgment for the respondents. In the Conclusion to the Memorandum of Opinion and Order, the district court ruled: "Based on the foregoing, Plaintiff's Motion for Summary Judgment, ECF No. 5 is DENIED; and Defendants' Motion to Dismiss, ECF No. 6, is GRANTED..."[1] Accordingly, final judgment was entered dismissing the case.

The lower court's finding that "the record contained material outside the pleadings which the district court did not exclude from consideration" is seriously flawed. There is no material (evidence) outside the pleadings in the record, and nothing has been presented by the respondents as required by Rule 56 to show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Despite this state of the record, the lower court concluded that "the district court properly granted summary judgment in favor of Bird because he is entitled to qualified immunity."

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[1] The respondents' motion was simply a motion to dismiss, not a motion to dismiss or in the alternative a motion for summary judgment. From the record, it appears that the respondents' never sought to have the motion to dismiss treated as a motion for summary judgment.

Admittedly, petitioner did not respond to the alleged motion for summary judgment since she had no knowledge that the district court had treated the motion to dismiss as one for summary judgment.

The alarming aspect of the lower court's decision and its denial of the petition for rehearing is that in doing so it violated the petitioner's due process rights to notice and an opportunity to defend with respect to the Rule 12 (b) (6) grant of summary judgment to the defendants as secured to her by the Fifth and Fourteenth Amendments of the United States Constitution, and by the mandatory requirement of said Rule that "all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56." This latter provision of Rule 12 (b) (6), in effect, incorporated the due process and equal protection provisions of the federal constitution in its body.

Federal Rule of Civil Procedure 56 (c) provides that summary judgment is proper "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact. Celotex Corp. v Catrett, 477 U.S. 317, 323 (1986).

Adickes v S. H. Kress & Co., 398 U.S. 144, 159 held:

> The party opposing the motion for summary judgment bears the burden of responding *only* after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." (Emphasis by the Court).

In Celotex, *supra*, at 326, the court noted:

> "That district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all evidence." (underlining supplied).

The authors of Moore's Federal Practice, 3rd Ed., Section 12.34 (3) (b), state, with reference to the conversion option of Rule 12 (b) (6), as follows:

> When converting a Rule 12 (b) (6) motion to dismiss to a motion for summary judgment, the district court must give all parties notice and reasonable opportunity to present all material then made pertinent to Rule 56 (c). This does not mandate oral hearing but rather invokes the Rule 56 (c) provision for 10 days advance notice to the adverse party that the motion and all materials in support of or in opposition to the motion will be taken under advisement by the trial court as of a day certain.

The Eleventh Circuit requires the district judge to give all parties ten-day notice that he is converting the motion to dismiss into one for summary judgment by considering all matters outside the pleadings. This Circuit compels strict adherence to Rule 56 (c) requirement of 10 days notice and will reverse the dismissal without reviewing the merits of the motion for summary judgment. Jones v Automobile Insurance Co., 917 F. 2d 1528, 1532 (1990).

The plain language of Rule 12 (b) (6) mandates that the adverse party must be given a reasonable opportunity to

defend against motion for summary judgment that is being considered under the rule. Circuit Courts have held that the district judge must give notice that he is considering summary judgment under Rule 12 (b) (6), and must accord the adverse party a reasonable opportunity to respond to the motion for summary judgment before he grants the judgment. Failure to do so will result in reversal of the dismissal. In re Rockefeller Ctr. Props., Sec. Litig, 184 F 3d 280, 287-289 (3d Cir. 1999); Belogun v INS, 9 F 3d 347, 352 (5th Cir. 1993); Alioto v Marshal Fields & Co., 77 F 3d 934, 936, (7th Cir. 1996); Court v Hall County, Neb. 725 F 2d 1170 (8th Cir. 1984).

The Panel in this case disregarded the Sixth Circuit's established rule on the subject issue as enunciated in Salehpour v Univ. of Tenn., 159 F 3d 199, wherein the court held:

> Where one party is likely to be surprised by the proceedings, notice is required.

The Panel also overlooked the reference in Salehpour to this Court's admonition in Celotex that the losing party must be put on notice that she "had to come forward with all the evidence" when the court has under consideration a motion for summary judgment.

The lower court decision is in direct conflict with the decision of this Court in Carter v Stanton, 405 U.S. 669 (1972), and with the Court's admonition in Celotex, *supra*.

The per curiam opinion in Carter stated:

> ...it appears that at the hearing on the motion to dismiss, which was based in part on the asserted failure "to state a claim upon which relief can be granted"... matters outside the

> pleadings were presented and not excluded by the court. The court was therefore required by Rule 12 (b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56.

The Court went on to state:

> Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. If this is the course the district court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim. In this posture of the case, we are unconvinced that summary judgment was properly granted.

The aforesaid statement is particularly relevant with respect to the propriety of the lower court's *de novo* review and ruling regarding the Rule 12 (b) (6) issue in the case.

II. Substantial Legal Issues Presented On Appeal Were Rendered Moot By The Lower Court's Erroneous Affirmance Of The Grant Of Summary Judgment.

The lower court's decision represents a simplistic and summary disposition of an appeal that involves substantial questions of law affecting fundamental rights which have not been addressed by the court.

Bird did not have *personal knowledge* of the facts and circumstances surrounding the accident to enable him to

affirm the truth of the statement he had given under oath and filed with the trial court that petitioner had violated Section 311.11a or the city's traffic code; i.e., that she did not make a right turn into the church parking area "from as close as practicable to the right hand curb or edge of (Wooster) the roadway."

No apparent facts exist which, upon reasonable inquiry, would induce a fair and prudent person to believe that petitioner had committed the offense with which she was charged. Bird's sworn statement upon which he made the charge and on which the complaint against the petitioner was filed and pursued was based entirely on that which he was told by the other party to the accident. Bird chose to believe the other party's version of the accident, and to act upon that information, without any corroborating or independent evidence to support it. Pure hearsay - totally inadmissible, incompetent and unacceptable upon which to lodge a criminal charge against the petitioner or any person under our system of justice. An oath is an affirmation of the truth of a statement, which renders one asserting untrue statements punishable by perjury. Black's Law Dictionary, 5 ed.

That which occurred in the instant case is not uncommon in many automobile accident situations where the officer arrives at the scene after the collision, the vehicles are no longer in the collision position and there are no witnesses other than the parties. It is customary in such circumstances for the officer to advise the parties to resolve the matter among themselves or to resort to their legal remedies. This was not done in the present case. It is to be noted that the other party to the accident would have been the appropriate one to file a complaint against the petitioner if he, in fact, believed that petitioner was at fault. This would have been the normal thing to do. Inexplicably, the opposing party was relieved of that burden due to Bird's drastic decision to usurp the function of a judicial tribunal and declare the petitioner

the guilty one at the scene of the accident. The record is completely silent as to the reason or justification for such unconventional conduct by Bird. The opposing party, having the benefit of Bird's official pronouncement that petitioner was a fault, submitted a claim to petitioner's Insurer for his damage which the latter paid immediately.

Admittedly, the duty of a police officer to investigate an automobile accident between citizens, and to file a record of his findings is a necessary and important function of his office; however, due process requires him to do so in an impartial and fair manner. When police are permitted to act ungoverned by due process, they become unaccountable to the public for their wrongful acts and conduct.

The lower court's response to the issues raised on appeal is stated in the decision as follows: "Vintilla's complaint failed to allege that Bird violated a clearly established constitutional right under the Due Process Clauses of the Fifth and Fourteenth Amendments (citations omitted). In addition, Vintilla's malicious prosecution claim fails because she did not allege a Fourth Amendment claim (citation omitted)."

The aforesaid conclusions were reached by the court in complete defiance of the undisputed material facts in the record and with a clear misapprehension or denial of the controlling law.

The lower court overlooked and did not consider the substantial issues which were properly presented for review and decision by the petitioner, to wit: 1) Petitioner's motion for summary judgment. 2) Due Process and the Insurance Issue. 3) Brandon v Holt, 483 U.S. 464, as the authority for the section 1983 claim against the City. 4) Petitioner's section 1983 malicious prosecution claim.

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure with supporting affidavits in compliance with the requirements of the Rule. The respondents did not come forward with proof of the absence of any genuine issue of material fact as required by Rule 56 (e) See Adickes, supra; Anderson v Liberty Lobby, 44 / U.S. 242, 250 (1986). The district court denied the motion without any remarks or observations about the propriety of the motion. The lower court ignored petitioner's motion entirely.

DUE PROCESS AND THE INSURANCE ISSUE

Petitioner was informed by a letter from her automobile insurance company that they had declared her at fault for the accident of December 10, 2000, and that her policy had been cancelled as a result thereof. Thereafter, a new policy was issued at a substantial increase in the premium.

The district court held that "Vintilla cannot establish a procedural due process violation because she cannot show that the government deprived her of her property; i.e., that the government increased her insurance premiums. Any claim that she has over the increase in her insurance rates must be taken up with her insurance company." The lower court ignored this issue completely, although it was properly before it for review and decision.

The evidence is undisputed that respondent Bird had caused the cancellation of petitioner's policy and the subsequent increase in the premium by falsely declaring her as the guilty party for the accident, and by placing that information in a sworn complaint which became a part of the

official court record. In doing so, respondent Bird made the information accessible and facially reliable to the insurance company and the general public. Had Bird not lied in stating that the petitioner violated the law and caused the accident, there would have been no basis for the insurer to cancel her policy and issue a new one with an increase in the premium.

The evidence demonstrates beyond dispute that there was a direct link between Bird's behavior and the deprivation of property without due process of law.

SECTION 1983 CLAIM FOR MALICIOUS PROSECUTION

The lower court held that "Vintilla's (petitioner) malicious prosecution claim fails because she did not allege a Fourth Amendment claim. See *Thacker v City of Columbus*, 328 F. 3d 244, 258 (6th Cir. 2003)".

Petitioner did not specifically allege the Fourth Amendment as one of the federal constitutional rights that Bird had violated in his actions against her. However, the record does contain sufficient undisputed evidence to establish that petitioner is entitled to the protection of the amendment.

The question that arises in this connection is whether petitioner has waived the right to the protection of the amendment because she did not allege it in the complaint. Rule 15 (a), Federal Rules of Civil Procedure states: "A party may amend a pleading as a matter of course at any time before a responsive pleading is served."

A responsive pleading to the complaint was not served on the petitioner. Instead, the respondents filed a motion to dismiss the complaint for failure to state a cause of action,

and a brief in opposition to petitioner's motion for summary judgement.

In view of the status of the case, and under the facts and circumstances in the record, petitioner had a clear right to amend the complaint to allege a Fourth Amendment claim. This issue became moot as a result of the district court's dismissal of the complaint.

The facts and circumstances of the instant case, whereby a police officer has charged the petitioner falsely in a sworn complaint and implicated her in criminal prosecution that was dismissed before trial, demonstrate that this is a case of egregious behavior which will support a 1983 malicious prosecution claim under substantive due process of law.

The Sixth Circuit appears to acknowledge a Fourth Amendment right to be free from malicious prosecution. In Spurflock v Saterfield, 167 F. 3d 995, 1006 (1999), the court interpreted Albright v Oliver, 510 U.S. 266, 271 (1994) as authorizing a Fourth Amendment malicious prosecution claim. See also Johnson v Ward, 43 Fed. Apx. 779, 2002, WL 1774215 (6th Cir. 2002). Nonetheless, the panel overlooked these rulings in reaching its decision.

SECTION 1983 CLAIM AGAINST THE CITY

The question whether the City of Rocky River is a proper party to this action has been answered by this Court in Brandon v Holt, 469 U.S. 464 at 451:

> In at least three recent cases arising under Section 1983, we have implied that a judgment against a public servant in his official capacity imposes liability on the entity that he represents, provided, of course, the public entity received notice and an

opportunity to respond. We now make this point explicit.

Brandon has been followed by many circuit courts and by this court. In McMillian v Monroe County (1997), 138 L. Ed. 2d 1, the court stated p. 7, fn. 2:

> We have explained that a suit against a governmental officer "in his official capacity" is the same as a suit "against (the) entity of which (the) officer is an agent." Kentucky Graham, 473 U.S. 159, 165, quoting Monell v New York City Department of Social Services, 436 U.W. 658, 690, frn. 5 (1978), and victory in such an "official capacity, imposes liability on the entity that (the) officer represents." Brandon v Holt, 469 U.S. 464, 471 (1985).

The entire notion of holding a municipality or some other government entity liable under Section 1983 rests upon the belief that the entity is somehow represented by the individual person who is specifically named as a defendant and who actually committed the alleged constitutional violation. It is clear, petitioner believes, that Bird represents the City of Rocky River when he acts in a law enforcement capacity as a member of the Rocky River Police Department.

The gravamen of the petitioner's complaint is that she was falsely charged with a criminal offense in a sworn statement filed by a police officer that required her to defend against a criminal prosecution of that charge which was dismissed on the initiative of the police officer while she was in court awaiting the call to trial.

As a consequence of the officer's actions and behavior, petitioner was compelled to engage legal counsel, with its attendant loss of time and monetary expense, to make court

appearances, prepare for trial, suffer anxiety, humiliation, curtailment of liberty, loss of property and the invasion of her privacy.

The district court trivialized the police officer's constitutional transgressions, and the serious consequences endured by the petitioner, and went on to characterize the controversy as nothing more than the officer's disagreement with the petitioner as to who caused the accident. This conduct of the district court was sanctioned by the lower court in its silence with respect thereto.

The basic rights secured to all persons by the Constitution of the United States must be scrupulously safeguarded by all government officials in whom the people have reposed the duty to protect and preserve those rights. The violation of any of those rights must not be condoned simply because they have arisen in the context of a police court matter.

It is a truism that many citizens have their first and perhaps only encounter with the administration of justice in a police court. The experience in that court may very well form their respect or lack of respect for the fairness of our courts and the integrity of the law.

CONCLUSION

The petition for a writ of certiorari should be granted and the Court should reverse the lower court's order for the reasons set forth herein. Petitioner requests that the Court provide uniform guidance to the lower courts as to the proper use of summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a Rule 12 (b) (6) situation of the Rules. Petitioner further requests that the Court consider whether the Court of Appeals has so far departed from the accepted and

usual course of judicial procedures as to call for the exercise of the Court's supervisory power.

Respectfully submitted,

JOHN R. VINTILLA

APPENDIX A

No. 03-3543

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LUCRETIA G. VINTILLA,	)	FILED APRIL 15, 2004 LEONARD GREEN, CLERK
	)	
Plaintiff-Appellant,	)	
v.	)	
	)	ORDER
CITY OF ROCKY RIVER, OHIO; R. BIRD,	)	
	)	
Defendants-Appellees.	)	

Before: MARTIN and CLAY, Circuit Judges: MILLS, District Judge.*

Lucretia G. Vintilla, proceeding through counsel, petitions the court to rehear its order, filed on March 3, 2004, which affirmed a district court judgment dismissing her civil rights complaint filed pursuant to 42 U.S.C. § § 1983 and 1985.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a). The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/ s / Leonard Green
Clerk

*The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX B

No. 03-3543

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LUCRETIA G. VINTILLA,	)	FILED
	)	MARCH 3, 2004
Plaintiff-Appellant,	)	LEONARD GREEN,
v.	)	CLERK
	)	ORDER
CITY OF ROCKY RIVER, OHIO; R. BIRD,	)	
	)	
Defendants-Appellees.	)	

Before: MARTIN and CLAY, Circuit Judges: MILLS, District Judge.*

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 28 (g) limits citation to specific situations., Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

Lucretia G. Vintilla, proceeding through counsel, appeals a district court judgment dismissing her civil rights complaint filed pursuant to 42 U.S.C. § § 1983 and 1985(3). This case has been referred to a panel of the court pursuant to Rule 34 (j)(1), Rules of the Sixth circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

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*The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

Seeking monetary relief in the form of compensatory and punitive damages, Vintilla filed a complaint against the City of Rocky River, Ohio ("City"), and R. Bird, a police officer employed by the Rocky River Police Department. Relying upon the Fifth and Fourteenth Amendments, Vintilla alleged that the defendants violated her due process and equal protection rights. Vintilla explained that on December 10, 2000, the vehicle that she was driving collided with another vehicle. Vintilla and the driver of the other vehicle exchanged pertinent information and moved their vehicles from their respective collision positions. Bird subsequently responded to the accident scene and, after interviewing both parties, informed Vintilla that the accident was her fault. Thereafter, Vintilla alleged that she received a Summons in Lieu of Warrant commanding her to appear at the Rocky River Municipal Court "to plead to a charge that she had violated Section 311.11a of the traffic code of Rocky River and thereby caused the aforementioned accident." Vintilla alleged that the summons was based upon Bird's sworn complaint, which found her at fault for the accident. Vintilla alleged that she entered a plea of not guilty, but on the date set for trial, Bird agreed to dismiss the charge.

Vintilla also alleged that, following the accident, her automobile insurance carrier determined that she was at fault for the December 10, 2000, accident and canceled her insurance policy. Vintilla's insurance carrier subsequently renewed her policy, but substantially increased her premium. According to Vintilla, her insurance carrier's actions were based upon Bird's "improper report" and "unlawful complaint" made after the December 10, 2000, accident.

Vintilla filed a motion for summary judgment and the defendants filed a motion to dismiss. the district court denied Vintilla's motion, granted the defendants' motion, and

dismissed the case. The district court subsequently denied Vintilla's motion to reconsider. Vintilla now appeals.

Because the record contained material outside of the pleadings, which the district court did not exclude from consideration, the district court properly characterized the defendants' motion to dismiss as a motion for summary judgment. *See* Fed. R. Civ. P. 12 (b); *Soper v. Hoben*, 195 F. 3d 845, 850 (6th Cir. 1999); *Salehpour v. Univ. of Tenn.*, 159 F 3D 199, 204 (6th Cir. 1998). We review the district court's grant of summary judgment de novo. *Lanier v. Bryant*, 332 F. 3d 999, 1003 (6th Cir. 2003).

Upon review, we conclude that the district court properly granted summary judgment in favor of Bird because he is entitled to qualified immunity. In order to survive a defendant's assertion of qualified immunity, the plaintiff must allege sufficient facts to show that the defendant's conduct violated a clearly established constitutional right. *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991); *Mattox v. city of Forest Park*, 183 F. 3d 515, 520 (6th Cir. 1991).

Vintilla's complaint failed to allege that Bird violated a clearly established constitutional right under the Due Process Clauses of the Fifth and Fourteenth Amendments. *See Buchanan v. Apfel*, 249 F. 3d 485, 491 (6th Cir. 2001) (substantive due process); *Macene v. MJW, Inc.*, 951 F. 2d 700, 706 (6th Cir. 1991) (procedural due process). In addition, Vintilla's malicious prosecution claim fails because she did not allege a Fourth Amendment claim. *See Thacker v. City of Columbus*, 328 F. 3d, 244, 258 (6th Cir. 2003).

We further conclude that the district court properly granted summary judgment in favor of the City. Governmental entities cannot be held responsible for a constitutional deprivation unless there is a direct casual link

between a municipal policy or custom and the alleged violation of constitutional rights. *Monell v. Dept. of Soc. Servs.*, 436 US. 658, 691 (1978); *Gregory v. Shelby County, Tenn.*, 220 F. 3d 433, 442 (6th Cir. 2000). Moreover, the theory of respondent superior simply cannot provide the basis for liability in § 1983 actions. *Monell*, 436 U.S. at 691.

Vintilla neither alleged in her complaint nor presented any evidence in response to the defendants' motion for summary judgment that the City operated pursuant to an unconstitutional policy or custom requiring its police officers to violate the constitutional rights of its citizens. Even if Bird did violate Vintilla's constitutional rights, the City cannot be held responsible for his conduct under § 1983 simply because the City employed Bird. *See id; Stemler v. City of Florence*, 126 F. 3d 856, 865 (6th Cir. 1997).

Vintilla has waived appellate review of the district court's dismissal of her Fifth and Fourteenth Amendment equal protection claim, her § 1985 (3) claim, and her claim for punitive damages against the City. *See Buziashvili v. Inman*, 106 F. 3d 709, 719 (6th Cir. 1997); *Boyd v. Ford Motor Co.*, 948 F. 2d 283, 284 (6th Cir. 1991).

Accordingly, we affirm the district court's judgment. Rule 34 (j) (2) (c), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/ s / Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHO
EASTERN DIVISION

FILED
MARCH 7, 2003
CLERK, U.S. DISTRICT
COURT
NORTHERN DISTRICT
OF OHIO - CLEVELAND

LUCRETIA G. VINTILLA,	)	CASE NO. 1:02 CV
	)	2291
Plaintiff	)	
	)	JUDGE DAN
vs.	)	AARON POLSTER
	)	
	)	MEMORANDUM OF
CITY OF ROCKY RIVER, et al	)	OPINION AND
	)	ORDER
Defendants	)	

Before the Court is Plaintiff's Summary Judgment Motion, ("Plaintiff's Motion") **(ECF No. 5)** and Defendants' Motion to Dismiss, ("Defendants" Motion") **(ECF No. 6)**. Plaintiff Lucretia G. Vintilla, who was cited by Defendant Police Officer Richard Bird for causing a car accident when she entered her church parking lot on December 10, 2000, has sued Officer Bird and Defendant City of Rocky River ("city") under 42 U.S.C. § § 1983 and 1985 (3) for violating her rights under the Fifth and Fourteenth Amendments of the United States Constitution. For the following reasons, the Court

DENIES Plaintiff's Motion and **GRANTS** Defendants' Motion.

I. Facts

On December 10, 2000, Vintilla was involved in an accident with another vehicle after she made a right hand turn from the curb lane into the parking area of the Romanian Orthodox Church. Vintilla and the driver of the other vehicle exchanged insurance information and pulled their cars off to the side of the road. Thereafter, Officer Bird arrived at the scene and interviewed all of the involved parties. Officer Bird told Vintilla that she was at fault for the accident and that she would soon be hearing from a magistrate. He returned to his office and, after reviewing his notes, issued Vintilla a citation for violating Traffic Code 331.11 (a) of the City of Rocky River.

> The driver of a vehicle intending to turn right into a private road or driveway . . . from a public street or highway shall be governed by the following rule. (a) Approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the roadway.

Based on the citation issued to Vintilla in this accident, and a "backing accident" on January 2, 2000, *Plaintiff's Complaint*, Exh. 7a, Vintilla's insurance company canceled her policy. After she complained to the insurance company, the company reinstated her policy but at an increased rate.

Vintilla received a Summons in Lieu of Warrant commanding her appearance before Rocky River Municipal Court on January 24, 2001. Vintilla appeared in court and entered a plea of not guilty to the charge. The case was

scheduled for trial on February 26, 2001. Vintilla filed a motion to dismiss on February 17, 2001. On the morning of the trial date, Officer Bird, upon speaking with all the parties involved and hearing that Vintilla's insurance company compensated the other driver in the accident, dismissed his complaint.

Vintilla's complaint alleges that Officer Bird's sworn complaint, which generated and formed the basis of the criminal proceeding against her, violated rights secured to her by the Constitution of the United States. Vintilla is seeking compensatory damages of $35,000, punitive damages of $5,000, and reasonable attorney's fees.

II. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©. "In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences therefrom in a light most favorable to the nonmoving party." *Williams v. Belknap,* 154 F.Supp.2d 1069, 1071 (E.D.Mich.2001) (citing *60 Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir. 1987). If, after reviewing the record as a whole, a rational fact finder could not find for the nonmoving party, summary judgment is appropriate since there is no genuine issue for trial. *See LaPointe v. United Autoworkers Local 600,* 8 F.3d 376, 378 (6th Cir. 1993). Although Defendants filed a motion to dismiss, they attached Officer Bird's affidavit. *ECF No. 6.* Accordingly, the Court will also treat Defendants' motion as one for summary judgment. *Salehpour v. University of Tennessee*, 159 F.3d 199, 900 (6th Cir. 1998) (holding that it

is appropriate to treat a motion for dismiss that goes beyond the pleadings as a motion for summary judgment).

III. Law and Analysis

To prevail on a civil action under 42 U.S.C. § 1983[1], a plaintiff must plead and prove that the defendant, acting under the color of state law, deprived him of a right secured by the Constitution and laws of the United States[2]. *Paul v. Davis,* 424 U.S. 693, 700 (1976); *Sutton v. Cleveland Bd. of Educ.,* 958 F2d 1339, 1348 (6th Cir. 1992). However, qualified immunity protects officers performing discretionary functions from § 1983 actions insofar as their conduct does not violate clearly-established constitutional rights of which a reasonable person would have known. *Jackson v. Leighton,* 168 F.3d 903, 909 (6th Cir. 1999) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity protects public officials from the harsh burden of litigation; thus, the threshold immunity question should be addressed as early in the litigation as possible. *Siegert v. Gilley,* 500 U.S.

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[1]Vintilla also alleges a 42 U.S.C. § 1985 claim. However, she never argues the merits of this claim nor does she even mention this claim in her Supplemental Answer Brief. Although Vintilla claims that she was deprived of equal protection of the laws in her complaint, she states no basis for this claim in her motion. The Court will treat this absence as a concession that her § 1985 lacks merit and will solely address her § 1983 claim.

[2]42 U.S.C. § 1983 provides in relevant part that:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

226, 232 (1991); *Saylor v. Board of Educ.*, 118 F.3d 507, 512 (6th Cir. 1997). Before determining whether the right violated was clearly established or examining the reasonableness of a defendant's conduct in relation thereof, the Court should decide as a preliminary matter whether a violation of a constitutional right occurred at all. *Jackson*, 168 F.3d at 909 (citing *Siegert*, 500 U.S. at 232). If the Court finds that no right was in fact violated, then the Court need not inquire further into whether the defendant satisfies the remaining elements of the qualified immunity doctrine. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

A. Claims Against Officer Bird

Vintilla, who brings her § 1983 claims under the Fifth and Fourteenth Amendments, *Plaintiff's Complaint*, at 1, frames her summary judgment argument in the following manner:

> The central issue in the case and the crux of the instant litigation is whether defendant Bird's sworn complaint, which generated and formed the basis of the criminal proceedings against the plaintiff in the Rocky River Municipal Court, violated the rights of the plaintiff as secured to her by the Constitution of the United States.
>
> The threshold question that must be answered is whether defendant Bird acted unlawfully in executing, in filing and in pursuing the complaint against the plaintiff in the Rocky River Municipal Court.

Plaintiff's Motion, at 1. While Vintilla acknowledges that it is the duty of a police officer to investigate automobile accidents and to file a record of his findings, she claims that

due process requires that he do so in an impartial and fair manner. *Plaintiff's Motion,* at 3-4. Accordingly to Vintilla, Officer Bird

> went far beyond the performance of his established duties. He not only executed, filed and pursued an unlawful complaint against the plaintiff, he also arbitrarily usurped the function of a judicial tribunal and improperly pronounced the plaintiff 'at fault' for the accident. Thus, in one broad sweep, [Officer Bird] removed the cloak of 'innocent until proven guilty' which the Constitution wrapped around the plaintiff, and thereby deprived her of a fundamental constitutional right.

Plaintiff's Motion, at 4.

It is clear from the pleadings and the uncontroverted documents, however, that Vintilla cannot defeat Defendants' claim of qualified immunity because she has not established any constitutional violation. As Vintilla herself notes, it is among the routine duties of police officers to investigate car accidents. As one Ohio appeals court noted:

> Police officers who investigate accidents are called to the scene many times after the accident has occurred; seldom do they observe an accident in progress. After arriving at the scene of an accident, officers conduct an investigation by interviewing the parties and witnesses, if any, and gather physical evidence, if any, at the scene. Based upon their investigation, in many instances an officer will issue a citation on the spot.

Cleveland v. Nagy, No. 56730, 1990 WL 43653 *3 (Ohio Ct. App. Apr. 12, 1990). In this case, Officer Bird was called to the scene of Vintilla's accident. After questioning the witnesses and making observations, he concluded that Vintilla was at fault and, after reviewing his notes at the police station, issued her a citation. The citation required her to appear at Rocky River Municipal Court, presumably to either plead guilty or no contest and pay a fine or to plead not guilty and set a trial date. This is normal police practice. Vintilla has not articulated how Officer Bird conducted his investigation in a partial and unfair manner. That Officer Bird disagreed with Vintilla's assessment of who caused the accident does not render his investigation, the issuance of a citation to her or the criminal proceeding that was dismissed, a violation of due process. Vintilla has cited no authority from the Sixth Circuit, the Supreme Court, or any other court, suggesting that a police officer commits a constitutional violation if he issues a traffic citation without witnessing an accident, and this Court has not found any such case law.

Vintilla also appears to claim that either the insurance company's cancellation of her insurance policy or its subsequent reinstatement of her policy at an increased premium constitutes a deprivation of her property without due process. "The Due Process Clause of the Fifth Amendment guarantees that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law.'" *United States v. James Daniel Good Real Property,* 510 U.S. 43, 48 (1993) (citations omitted). Due process requires that individuals must receive notice and an opportunity to be heard before the government deprives them of property. *Id* at 49 (citations omitted). Vintilla cannot establish a procedural due process violation because she cannot show that the government deprived her of her property, i.e., that the government increased her insurance premiums. Any claim

she has over the increase in her insurance rates must be taken up with her insurance company.

Vintilla's substantive due process allegations most nearly resemble a malicious prosecution claim, i.e., she has a due process right to be free of prosecution without reasonable cause. In *Frantz v. Village of Bradford,* 245 F.3d 869 (6th Cir. 2001), the Sixth Circuit resolved that, "in cases of egregious behavior that do not include a seizure, a plaintiff may have a § 1983 malicious prosecution claim supported by substantive due process rights." *Id.* at 877 (interpreting the Supreme Court decision in *Albright v. Oliver,* 510 U.S. 266 (1994). *But see Frantz,* 245 F.3d at 877-881 (Gilman, J., dissenting) (perceiving the majority opinion to preclude § 1983 claims based on malicious prosecution).

By way of example, the Sixth Circuit explained that "substantive due process may support a § 1983 malicious prosecution claim against a police officer who plants false evidence to implicate a suspect whose arrest was supported by probable cause, or against a state official found guilty of bribing jurors." *Frantz,* 245 F.3d at 877. *See also Buchanan v. Apfel,* 249 F.3d 485, 488 (6th Cir. 2001) (plaintiff alleging substantive due process violation must allege egregious, arbitrary abuse of government power that shocks the conscience).

Based on these examples, Vintilla has not articulated or established sufficiently egregious conduct on the part of Officer Bird. The worst that she can say about Officer Bird is that, after conducting his investigation, he came to the wrong conclusion. However, a substantive due process violation requires more intentionally reprehensible conduct than making a mistake. In any event, because her substantive due process allegations involve a pretrial deprivation of liberty, she must confine her malicious prosecution claim to the

Fourth Amendment. *Frantz,* 245 F.3d at 877. But Vintilla did not bring a § 1983 claim under the Fourth Amendment.[3]

Finally, Vintilla alleges an equal protection claim. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' which is essentially a direction that all persons similarly situated should be treated alike." *Bower v. Village of Mount Sterling,* 2002 WL 1752270, at *5 (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985); *Richland Bookmart, Inc. v. Nichols,* 278 F 3d 570, 574 (6th Cir. 2002)). While the Equal Protection Clause traditionally involved claims that legislative action impacted certain protected groups disfavorably, the Sixth Circuit has recognized "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Dubuc v. Green Oak Tp.,* 312 F.3d 736, 752 (6th Cir. 2003) (quoting *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000)). Vintilla has not articulated, let alone established, how she has been treated differently from other similarly-

---

[3]Even if she had, she could not establish such a claim. The Fourth Amendment prohibits unreasonable searches and seizures; it is not a general prohibition against all unreasonable, unjustified or outrageous official conduct. *Cameron v. City of Pontiac,* 813 F.2d 782, 784 (6th Cir. 1987); *Tom v. Voida,* 963 F.2d 952, 956 (7th Cir. 1992). Vintilla does not allege that either she or her property was searched. Nor has she alleged that she was seized. *Michigan v. Chesternut,* 486 U.S. 567, 573 (1988) (a "seizure" of a person occurs under the Fourth Amendment when a police officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen such that the citizen would reasonably believe under all of the surrounding circumstances that he or she was not free to leave). Vintilla was never arrested. She received a summons in the mail. Thus, she cannot establish a Fourth Amendment violation either.

situated persons. Nor has she articulated or established irrational governmental conduct.

In short, Vintilla's unsupported legal conclusions that Officer Bird violated her due process and equal protection rights do not establish due process and equal protection claims. *Dominque v. Telb,* 831 F.2d 673, 676 (6th Cir. 1987); *Veney v. Hogan,* 70 F.3d 917, 922 (6th Cir. 1995). Because Vintilla has neither alleged nor established a violation of due process or equal protection against Officer Bird, his conduct is protected by qualified immunity and judgment must be granted in his favor. *Saucier,* 533 U.S. at 201.

B. Section 1983 Claim Against the City

In order for Vintilla to establish liability against the City under 42 U.S.C. § 1983, she must demonstrate that a deprivation of a constitutional right resulted from a City policy or custom. *Monell v. Dept. of Social Services City of New York,* 436 U.S. 658, 690-91 (1978). Plaintiff must establish that the City was the "moving force" behind the deprivation. *Board of County Comm'rs of Bryan County, Okla. v. Brown,* 520 U.S. 397, 404 (1997). Counties and municipalities cannot be held liable under § 1983 on a respondeat superior theory. *Id.* at 404.

Vintilla's only argument establishing liability against the City for the violation of her constitutionally-protected rights is based on Officer Bird's unlawful conduct. However, the doctrine of respondeat superior cannot provide the basis for § 1983 liability against the City. *Id.* Furthermore, she has established no underlying constitutional deprivation. *Monell,* 436 U.S. at 690-91. Nor has she bothered to articulate a City policy or custom that caused any perceived deprivation. *Id.* As a result, Vintilla has failed to provide sufficient evidence to support her § 1983 claim against the City.

C. Punitive Damages

Punitive damages may not be awarded under § 1983 claims against the City. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (holding that municipalities are immune to punitive damages); *Chonich v. Wayne County Community College*, 973 F.2d 1271, 1274 n.3 (6th Cir. 1992).

III. Conclusion

Based on the foregoing, Plaintiff's Motion for Summary Judgment, **ECF No. 5,** is **DENIED**; and Defendants' Motion to Dismiss, **ECF No. 6**, is **GRANTED**. This Memorandum of Opinion and Order dismisses with prejudice all claims set forth in the Complaint.

IT IS SO ORDERED.

/ s / Dan Aaron Polster
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHO
EASTERN DIVISION

FILED
MARCH 7, 2003
CLERK, U.S. DISTRICT
COURT
NORTHERN DISTRICT
OF OHIO - CLEVELAND

LUCRETIA G. VINTILLA,	)	CASE NO. 1:02 CV
	)	2291
Plaintiff	)	
	)	JUDGE DAN
vs.	)	AARON POLSTER
	)	
	)	
CITY OF ROCKY RIVER, et al	)	JUDGMENT ENTRY
	)	
Defendants	)	

For the reasons stated in the Memorandum of Opinion and Order filed contemporaneously with this Judgment Entry, and pursuant to Federal Rule of Civil Procedure 58, it is hereby ORDERED, ADJUDGED AND DECREED that the above-captioned case is hereby terminated and dismissed as final.

/s/ Dan Aaron Polster
United States District Judge

APPENDIX E

AMENDMENT V

. . . No person shall be deprived of life, liberty or property without due process of law; . . .

APPENDIX F

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

FEDERAL RULES OF CIVIL PROCEDURE
RULE 12 (b) (6)

. . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

APPENDIX H

42 U.S.C., Section 1983

.Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX I

43 U.S.C., Section 1985 (3)

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; . . . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(2)

Supreme Court, U.S.
FILED
MAR 21 2004
OFFICE OF THE CLERK

No. 03-1721

IN THE

Supreme Court of the United States

LUCRETIA G. VINTILLA,

Petitioner,

v.

CITY OF ROCKY RIVER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court should accept for review the decisions of the District Court for the Northern District of Ohio, Eastern Division, and Sixth Circuit Court of Appeals which correctly applied the Federal Rules of Civil Procedure in converting a Motion to Dismiss a Complaint for Failure to State a Claim for Which Relief May Granted into a Motion for Summary Judgment Pursuant to Rule 12(b).

2. Whether the Supreme Court should accept for review the decisions of the District Court for the Northern District of Ohio, Eastern Division, and Sixth Circuit Court of Appeals which correctly determined that R. Bird, a police officer for the city of Rocky River, was entitled to qualified immunity, where the Petitioner failed to allege sufficient facts to show that the officer's conduct violated a clearly established constitutional right under the Due Process Clause of the Fifth and Fourteenth Amendments.

3. Whether the Supreme Court should accept for review the decisions of the District Court for the Northern District of Ohio, Eastern Division, and Sixth Circuit Court of Appeals which correctly held that an increase in insurance premiums does not constitute a deprivation of Petitioner's property without due process.

4. Whether the Supreme Court should accept for review the decisions of the District Court for the Northern District of Ohio, Eastern Division, and Sixth Circuit Court of Appeals which correctly held that Petitioner's

malicious prosecution claim failed because Officer Bird's conduct did not constitute "egregious, arbitrary abuse of government power that shocks the conscience."

5. Whether the Supreme Court should accept for review the decisions of the District Court for the Northern District of Ohio, Eastern Division, and Sixth Circuit Court of Appeals which correctly held that the city of Rocky River was entitled to summary judgment because there was no causal link between a municipal policy or custom and the alleged violation of Constitutional rights.

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OPINIONS BELOW

The order of the Court of Appeals for the Sixth Circuit is satisfactorily reprinted as Appendix B to the petition, as is the order of the Court of Appeals for the Sixth Circuit denying Petitioner's motion for rehearing, reprinted as Appendix A to the petition.

Because the order of the United States District Court, Northern District of Ohio, Eastern Division, granting Petitioner's Motion for Reconsideration and decision to leave the underlying summary judgment ruling undisturbed was not reprinted in Petitioner's appendix, it appears as Appendix A to this brief.

The order of the United States District Court, Northern District of Ohio, Eastern Division, is satisfactorily reprinted as Appendix C to the petition, as is the Judgment Entry of the District Court, reprinted as Appendix D to the petition.

STATEMENT OF THE FACTS

On December 10, 2000, Petitioner was involved in a motor vehicle accident with another vehicle after she made a right hand turn from the curb lane into the parking area of the Romanian Orthodox Church. Petitioner and the driver of the other vehicle exchanged insurance information and pulled their cars off to the side of the road into the parking lot. Thereafter, Officer Bird had occasion to arrive at the scene of the accident where he interviewed both parties and determined that Petitioner was at fault for the accident.

Instead of issuing a citation directly at the accident scene, Officer Bird went back to the station where he then, after

reviewing his notes, issued Petitioner a traffic citation. The citation was for a violation of Traffic Code 331.11(a) of the City of Rocky River which states:

> The driver of a vehicle intending to turn right into a private road or driveway, . . . from a public street or highway shall be governed by the following rule. (a) Approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the roadway.

As a result of this accident, and based upon a "backing accident" on January 2, 2000, Petitioner's insurance company cancelled her policy. After she complained to the insurance company, the company reinstated her policy but at an increased rate.

Thereafter, Petitioner received a Summons in Lieu of Warrant commanding her to appear before the Rocky River Municipal Court on January 24, 2001. After entering a plea of not guilty, Petitioner's traffic case was scheduled for a trial on February 26, 2001.

On February 26, 2001, Officer Bird spoke with the victim of the accident and learned that all of the property damage had been properly and satisfactorily taken care of. As a result, Officer Bird agreed to have the case dismissed.

STATEMENT OF THE CASE

On November 21, 2002, Petitioner filed her Complaint against the City of Rocky River and Police Officer Richard Bird in the District Court for the Northern District of Ohio, Eastern Division. In the Complaint, Petitioner alleged that

Officer Bird's sworn criminal traffic complaint, which generated and formed the basis of the criminal proceedings against her, violated rights secured to her by the Fifth and Fourteenth Amendments to the United Stated Constitution and that the city of Rocky River was liable under a theory of respondeat superior.

On December 11, 2002, Petitioner filed a Motion for Summary Judgment. In support of her motion, Petitioner submitted the Complaint, the affidavits and exhibits annexed thereto, and a brief. On December 16, 2002, Respondents filed their responsive pleading in the form of a Federal Rule of Civil Procedure 12(b)(6) pre-answer Motion to Dismiss *and* Federal Rule of Civil Procedure 56 Brief in Opposition to Petitioner's Motion for Summary Judgment. Responses were subsequently filed and Judge Polster published his well-written and well-reasoned Memorandum of Opinion and Order on March 7, 2003. Petitioner filed a Motion for Reconsideration which Judge Polster summarily denied on March 21, 2003.

The crux of Judge Polster's decision was that the claims against Officer Bird failed because Petitioner could not establish the existence of a constitutional violation. Furthermore, Officer Bird's conduct was not a violation of due process because Petitioner could not show that the *government* deprived her of her property (i.e. increased her insurance premiums.) Finally, the district court rejected Petitioner's substantive due process allegations because a substantive due process violation requires "more intentionally reprehensible conduct than making a mistake."[1]

---

1. The District Court also held that Petitioner's malicious prosecution claim failed because she did not allege a Fourth Amendment claim. However, the court acknowledged that even if she had, she could not establish such a claim.

With respect to the city of Rocky River, the District Court correctly held that no *Monell* violation could be found as no policy or custom was pled in Petitioner's Complaint. Further, the court noted that Petitioner had not established an underlying constitutional deprivation. Lastly, it is well-established constitutional precedent that respondeat superior claims are completely and utterly inappropriate for 42 U.S.C. § 1983 actions.

Petitioner then filed an appeal to the Sixth Circuit Court of Appeals. On March 3, 2004, the Sixth Circuit held that the district court properly granted summary judgment in favor of Officer Bird and the city of Rocky River. The court reasoned that Bird was entitled to qualified immunity because Petitioner failed to allege that Bird violated a clearly established constitutional right under the Due Process Clause of the Fifth and Fourteenth Amendments.

Further, the Sixth Circuit reasoned that the city of Rocky River cannot be held responsible for a constitutional deprivation unless there is a direct causal link between a municipal policy or custom and the alleged violation of constitutional rights. Petitioner neither alleged nor presented evidence that the city operated pursuant to an unconstitutional policy or custom requiring its police officers to violate the constitutional rights of its citizens. On April 15, 2004, the Sixth Circuit denied Petitioner's Petition for Rehearing.

REASONS FOR DENYING THE PETITION

A. The Judgment of the Sixth Circuit Does Not Invoke Any of the Grounds for Relief Recognized by Rule 10 of the Supreme Court Rules.

Rule 10 provides that "a petition of a writ of certiorari will be granted only for compelling reasons." This case presents no compelling reason. The Sixth Circuit's judgment does not conflict with any decision of another circuit on the same question. The Sixth Circuit did not decide an important federal question in a way that conflicts with the decision by a state court of last resort. It did not decide an important federal question in a way that conflicts with relevant decisions of this Court. Finally, the Sixth Circuit's judgment has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

In finding in favor of the Respondents, District Court for the Northern District of Ohio, Eastern Division, and the Sixth Circuit applied long-standing principles governing the Federal Rules of Civil Procedure, qualified immunity, constitutional interpretation, and liability pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Because the Sixth Circuit's opinion is consistent with the Federal Rules of Civil Procedure, the United States Constitution, and relevant case law, this Court should deny Petitioner's writ of certiorari.

B. The District Court and Sixth Circuit Correctly Applied the Federal Rules of Civil Procedure in Converting a Motion to Dismiss a Complaint for Failure to State a Claim for Which Relief May Be Granted into a Motion for Summary Judgment Pursuant to Rule 12(b).

Federal Rule of Civil Procedure 12(b) provides in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In the underlying case, Petitioner filed a Motion for Summary Judgment prior to the Respondents' Answer due date. In support of her motion, Petitioner submitted the Complaint, the affidavits and exhibits annexed thereto, and a brief. Specifically, Petitioner submitted twelve exhibits, including her own affidavit, the Rocky River Municipal Court Summons in Lieu of Warrant, a copy of the ticket issued to her by Officer Bird, the Rocky River Municipal Court's Journal Entry dismissing the case with costs to Petitioner, copies of correspondence prepared by her attorney, and documents evidencing the changes in her insurance premiums.

In response to Petitioner's Complaint and immediate Motion for Summary Judgment, Respondents filed a Motion to Dismiss pursuant to Fed. Civ. R. 12(b)(6) *and* Brief in Opposition to Petitioner's Motion for Summary Judgment pursuant to Fed. Civ. R. 56. Attached to that joint motion was an affidavit on behalf of Officer Bird. Petitioner subsequently filed an Answer Brief and a separate Supplemental Answer Brief prior to the court's ruling in favor of the Respondents.

On appeal, Petitioner claimed that the District Court failed to give her reasonable notice of the conversion of the Rule 12(b)(6) motion into one for summary judgment or an opportunity to respond to said motion. Petitioner's claim must fail for two reasons. First, Petitioner fails to acknowledge that Respondents' Motion to Dismiss was also a Brief in Opposition to her Motion for Summary Judgment. Thus, the officer's affidavit was attached to support both of Respondents' motions. Second, Petitioner had an opportunity to respond to Respondents' motions and took advantage of that opportunity by filing two answer briefs. This is contrary to Petitioner's claim that she did not respond to the alleged Motion for Summary Judgment because she had no knowledge that the court would treat the Motion to Dismiss as one for Summary Judgment.

The district court did not err in treating Respondents' Motion to Dismiss as one for Summary Judgment. It is appropriate to treat a motion to dismiss that goes beyond the pleadings as a motion for summary judgment. *See* Fed. Civ. R. 12(b); *Vakilian v. Shaw* 335 F.3d 509, 515 (6th Cir. 2003); *Salehpour v. University of Tennessee* 159 F.3d 199, 204 (6th Cir. 1998). In considering both parties' brief and exhibits, the court properly concluded that there was no genuine issue

of material fact and the Respondents were entitled to judgment as a matter of law. Petitioner fails to cite to any Sixth Circuit or United States Supreme Court case which requires the court to give a party verbal notice that a motion to dismiss will be treated as one for summary judgment.

Finally, Petitioner's argument is nonsensical in that she filed her own motion for summary judgment setting forth all materials in support of her claim that there is no genuine issue of material fact, but now argues that she was deprived of her due process rights to notice and an opportunity to defend with respect to the 12(b)(6) grant of summary judgment in favor of the Respondents because she was not put on notice that she had to come forward with all evidence. Not only did Petitioner present evidence outside of the pleadings to the Court by lieu of her own motion for summary judgment, she filed two briefs in response to Respondents' motions.

The District Court and Sixth Circuit correctly applied the Federal Rules of Civil Procedure in converting a motion to dismiss a complaint for failure to state a claim for which relief may be granted into a motion for summary judgment pursuant to Rule 12(b). Accordingly, Respondents request that this Court deny the Petition for a Writ of Certiorari.

C. The District Court and Sixth Circuit Correctly Found in Favor of the Respondent Officer Bird Due To The Lack Of The Existence Of A Constitutional Violation.

In order to prevail on a civil action under 42 U.S.C. § 1983, a plaintiff must plead and prove that the defendant, acting under a color of state law, deprived him of a right secured by the Constitution and the laws of the United States.

Paul v. Davis, 424 U.S. 693, 700 (1976). Generally, government officials performing discretionary functions have qualified immunity "shielding them from civil damages liability, as long as their actions could reasonably have been thought to be consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034 (1987).

It is the plaintiff's ultimate burden of proof to establish that the defendants are not entitled to qualified immunity. *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991). First, a plaintiff must show that a constitutional violation has occurred. If a court finds that no right was in fact violated, then the Court need not inquire further into whether the defendant satisfies the remaining elements of the qualified immunity doctrine. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Petitioner brought her § 1983 claims under the Fifth and Fourteenth Amendments and framed her argument in the following ways:

> The central issue in the case and the crux of the instant litigation is whether defendant Bird's sworn complaint, which generated and formed the basis of the criminal proceedings against the plaintiff in the Rocky River Municipal Court, violated the rights of the plaintiff as secured to her by the Constitution of the United States.
>
> The threshold question that must be answered is whether defendant Bird acted unlawfully in executing, in filing and in pursuing the complaint against the plaintiff in the Rocky River Municipal Court.

Therefore, the basis of Petitioner's Due Process and § 1983 claims against Officer Bird is based on the fact that Officer Bird filed and pursued the criminal traffic matter against her. Petitioner's claims that Officer Bird violated her constitutional rights by investigating an accident and coming to his professional and independent conclusion that she was at fault and then following up by signing an affidavit and criminal complaint for the traffic violation.

In dismissing these arguments, the District Court stated that it is clear from the pleadings and the uncontroverted documents that Petitioner cannot defeat Respondents' claim of qualified immunity because she has not established any constitutional violation. In citing to *Cleveland v. Nagy*, No. 56730, 1990 WL 43653, at *3, the court stated:

> Police officers who investigate accidents are called to the scene many times after the accident has occurred; seldom do they observe an accident in progress. After arriving at the scene of an accident, officers conduct an investigation by interviewing the parties and witnesses, if any, and gather physical evidence, if any, at the scene. Based upon their investigation, in many instances an officer will issue a citation on the spot.

As the District Court correctly noted, Officer Bird was called to the scene of the accident and after questioning the witnesses and making observations, he concluded that Petitioner was at fault and he subsequently issued her a citation. At no time has Petitioner articulated how Officer Bird conducted his investigation in an improper manner. The fact that Officer Bird investigated and disagreed with Petitioner's

up to the accident does not, without more, render his investigation, the issuance of a citation, and subsequent dismissal a violation of due process or any other Constitutional right.

The District Court and Sixth Circuit correctly found in favor of the Respondent Officer Bird due to the lack of the existence of a Constitutional violation. Accordingly, Respondents request that this Court deny the petition for a writ of certiorari.

B. The District Court and Sixth Circuit Correctly Found in Favor of the Respondents As to Petitioner's Claim for Deprivation of Property without Due Process.

Petitioner claims that Officer Bird is responsible for the increase in her insurance premiums. Petitioner premises this by arguing that her cancellation, and subsequent reinstatement at a higher rate constituted a deprivation of her property without due process. Such claims were properly dismissed by the District Court and affirmed on appeal to the Sixth Circuit.

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993). Due process requires that individuals must receive notice and an opportunity to be heard before the government deprives them of property. *Id.* at 49. Petitioner cannot show

The District Court and Sixth Circuit correctly found in favor of the Respondents as to Petitioner's claim for deprivation of property without due process. Accordingly, Respondents request that this Court deny the petition for a writ of certiorari.

E. The District Court and Sixth Circuit Correctly Found in Favor of the Respondents As to Petitioner's Claim for Malicious Prosecution in Violation of her Substantive Due Process.

In *Frantz v. Village of Bradford*, 245 F.3d 869 (6th Cir. 2001), the Sixth Circuit held "[I]n cases of egregious behavior that do not include a seizure, a plaintiff may have a § 1983 malicious prosecution claim supported by substantive due process rights." *Id.*, at 877. In the present case, Petitioner has failed to articulate egregious behavior on the part of Officer Bird. Petitioner's argument that Officer Bird came to the wrong conclusion when deciding who caused the accident does not suffice.

However, even if there was a deprivation, Petitioner failed at all times to bring such a claim in the lower court. There is no mention of the Fourth Amendment in her Complaint. Both the district court and Sixth Circuit properly pointed out that Petitioner did not bring a § 1983 claim under the Fourth Amendment.

The District Court and Sixth Circuit correctly found in
ondents as to Petitioner's claim for
on in violation of her substantive due
, Respondents request that this Court
a writ of certiorari.

F. The District Court and Sixth Circuit Correctly Found in Favor of the Respondents As To Vintilla's § 1983 Claims Against The City of Rocky River.

A municipality cannot be held vicariously liable for the acts of its employees or agents on respondeat superior grounds. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Owen v. City of Independence*, 445 U.S. 622 (1980). As the *Monell* Court explained:

> Instead, it is when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. . . . *Id.*, at 691.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Supreme Court explained that the official policy requirements of § 1983 sought to distinguish acts of the municipality from acts of employees of the municipality. The liability of a municipality was seen as being limited to actions for which the municipality was actually responsible. In *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Supreme Court held that a municipality cannot be held liable under § 1983 unless a claimant can prove that an unconstitutional municipal policy exists and that it has been furthered by actions of those who have final policy-making authority. *Id.*, at 128.

The only argument set forth by Petitioner is alleged wrongdoing on the part of Officer Bird. Because of the foregoing well established constitutional precedence, such a claim was properly dismissed by the District Court and affirmed on appeal by the Sixth Circuit.

Furthermore, a plaintiff cannot rest on mere conclusory allegations or mere conclusions. The allegation of a single incident of unconstitutional conduct by a municipal employee and a conclusory allegation of a policy or custom will never be sufficient. *Strauss v. City of Chicago*, 760 F.2d 765 (1985). More than one instance of conduct must be shown. *Id.*

Because Petitioner has failed to allege a policy or custom and cannot establish an underlying constitutional violation, Petitioner has failed to provide sufficient evidence to support her claim against the city. The District Court and Sixth Circuit correctly found in favor of the Respondents as to Petitioner's § 1983 claims against the City of Rocky River. Accordingly, Respondents request that this Court deny the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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* *Counsel of Record*

APPENDIX

APPENDIX — MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED MARCH 21, 2003

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 2291

JUDGE DAN AARON POLSTER

LUCRETIA G. VINTILLA,

Plaintiff,

vs.

CITY OF ROCKY RIVER, et al.,

Defendants.

MEMORANDUM OF OPINION AND ORDER

Before the Court is the Motion to Reconsider filed by Plaintiff Lucretia Vintilla on March 20, 2003 (ECF No. 12). By Motion, Plaintiff asks the Court to reconsider its ruling denying summary judgment to Plaintiff and granting summary judgment in favor of Defendants. *See ECF Nos. 10-11.* The Court **GRANTS** Plaintiff's request to reconsider its earlier ruling but, after reviewing Plaintiffs' arguments, shall leave the underlying summary judgment ruling **UNDISTURBED** for the following reason.

Appendix

Motions for reconsideration are "'extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged.'" *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F.Supp. 644, 669 (N.D. Ohio 1995) (quoting *In Re August, 1993 Regular Grand Jury*, 854 F.Supp. 1403, 1406 (S.D. Ind. 1994). "As such, motions for reconsideration are granted 'very sparingly.'" *Plaskon*, 904 F.Supp. at 669 (quoting *Bakari v. Beyer*, 870 F.Supp. 85, 88 (D.N.J. 1994)). Generally, the factors that justify reconsideration of a court's orders are: an intervening change in controlling law, the availability of new evidence, and the need to correct clear error or to prevent manifest injustice. *Plaskon*, 904 F.Supp. at 669 (quoting *Bermingham v. Sony Corp. of America, Inc.*, 820 F.Supp. 834, 856 (D.N.J.1992), *aff'd*, *37* F.3d 1485 (3rd Cir.1993). As District Judge Katz stated:

> Motions for reconsideration are not substitutes for appeal nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings. *Karr v. Castle*, 768 F.Supp. 1087, 1093 (D.Del. 1991), *aff'd sub nom.* 22 F.3d 303 (3rd Cir. 1994), *cert. denied sub nom.*, 513 U.S. 1084 (1995). "A party seeking reconsideration must show more than a disagreement with the Court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'" *Database America, Inc., v. Bellsouth Advertising* car *Pub. Corp.*, 825

F.Supp. 1216, 1220 (D.N.J. 1993), citing G-69 *v. Degnan,* 748 F.Supp. 274, 275 (D.N.J. 1990).

Plaskon, 904 F.Supp. at 669.

Plaintiff s arguments are no more than a recapitulation of the cases and arguments considered by the court prior to rendering its original decision.[1] Because she has failed to show an intervening change in controlling law, the availability of new evidence, the need to correct a clear error or to prevent manifest justice, her motion fails. Accordingly, the underlying summary judgment shall remain undisturbed.

IT IS SO ORDERED.

s/ Dan Aaron Polster

Dan Aaron Polster
United States District Judge

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1. For example, Plaintiff once again argues that she never received a citation from Officer Bird. *See Motion, at 2.* However, the Complaint that she filed includes the citation. *See ECF No. 1,* at 3. Even if she had only received a summons and complaint, however, the Court's ruling would still stand for the reasons set forth in its Memorandum of Opinion and Order. *See ECF No. 10.*

(3)

Supreme Court, U.S.
FILED
AUG - 4 2004
OFFICE OF THE CLERK

No. 03-1721

In The

Supreme Court of the United States

LUCRETIA G. VINTILLA,

Petitioner,

v.

CITY OF ROCKY RIVER, OHIO, R. BIRD,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO NEW POINTS RAISED IN BRIEF IN OPPOSITION

The Respondents have made factual statements in their brief which are incorrect, distorted or unsupported by the record. At page 3 of the brief, the respondents acknowledged that the petitioner filed a motion for summary judgment and that it was supported by the complaint, affidavits and exhibits annexed and a brief.

The evidence proffered by the petitioner in support of her motion for summary judgment established the absence of a genuine issue of material fact. Respondents failed to offer any evidentiary material to counter the petitioner's evidence as required by Rule 56 (e). This Rule states: ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.* (Italics supplied).

Respondents seek to confuse the issues regarding petitioner's motion for summary judgment with the respondents' motion to dismiss that was allegedly converted into a motion for summary judgment by the district court. Respondents stated at p. 7 of their brief that:" ". . . Petitioner had an opportunity to respond to Respondents' motions (presumably to the motion to dismiss and the alleged converted motion for summary judgment) by filing two answer briefs. This is contrary to Petitioner's claim that she did not respond to the alleged Motion for summary Judgment because she had no knowledge that the court would treat the Motion to Dismiss as one for summary Judgment."

The record shows that petitioner's answer briefs were directed to the motion to dismiss and not to the alleged conversion of that motion to one for summary judgment, of which the petitioner had no knowledge. Clearly, under Rule 56(E), a brief alone would be inadequate to counter a motion for summary judgment properly supported by the requisite evidentiary material.

The respondents response to petitioner's motion for summary judgment was limited to a brief which they filed in opposition to said motion and the affidavit of officer Bird (see copy attached). Officer Bird stated in the affidavit that "he actually investigated the accident." The question which arises in this connection is whether Bird conducted the requisite investigation and performed his duty in that respect as required by law.

Black's Law Dictionary, 5 ed., defines "investigation" as follows: ". . . to examine and inquire into with care and accuracy."

New World Dictionary, Second ed. states:

. . . to search into as to learn the facts, inquire into systematically.

What does the record demonstrate as to whether Bird "actually investigated the accident?" The undisputed evidence shows that Bird arrived at the scene of the accident after its occurrence and after the vehicles had been removed from the collision position. Bird talked to the parties separately, first with the opposing party and then with petitioner. The latter protested vehemently that she was not the guilty party. Nonetheless, Bird rushed to judgment and told petitioner a the scene of the accident categorically that she was at fault for the accident.

The full extent of Bird's "actual investigation" was the conflicting statements which he obtained from the parties at the scene of the accident, following which he pronounced petitioner at fault. It is noteworthy that Bird did not issue a citation at that time, although immediately thereafter he filed a sworn complaint charging petitioner with a violation of the law.

It is obvious that Bird did not and could not make an appropriate investigation of the accident "to learn the facts" and "to make a detailed examination to uncover the facts and to determine the truth" since he did not see the accident and was unable to examine the vehicles in their collision position. There was no independent witness to the accident. Thus it is readily apparent that Bird's affidavit filed with his brief in opposition to petitioner's motion for summary judgment is self-serving, conclusionary, with no probative value to counter the evidentiary material presented in support of the motion. Stated simply, it is inadequate.

Respondents argue that (pp 10, 11): "The fact that Officer Bird conducted his investigation and disagreed with Petitioner's version of the events leading up to the accident does not, without more, render his investigation, the issuance of a citation, and subsequent dismissal a violation of due process or any other Constitutional right." There are several serious flaws in the argument.

1. There could not be a true disagreement with Bird about how the accident occurred (his version) since Bird did not see the accident, did not observe the vehicles in their collision position and did not have an independent witness to the accident. Bird did not have personal knowledge of the facts and circumstances of the accident to form a valid opinion of the cause of the accident. 2. Bird did not issue a citation at the scene after he declared petitioner at fault, but instead he filed a sworn complaint falsely charging the

petitioner with a violation of the law that caused the accident and thereby provoked criminal proceedings against the petitioner which he dismissed before trial. The fact that petitioner was unlawfully subjected to a malicious prosecution action, that she was compelled to engage legal counsel, with its attendant monetary expense and loss of time, to make court appearances, prepare for trial, suffer anxiety, humiliation, curtailment of liberty, loss of property and the invasion of her privacy did not, in respondents' view and shared by the lower court, implicate federal due process violations of petitioner's rights.

Respondents insist, as held by the lower court, that petitioner did not show that her constitutional rights had been violated as a result of Bird's actions and conduct, and therefore Bird is entitled to qualified immunity from liability for his behavior.

In Anderson v. Creighton, 483 U.S. 635, the court held:

> Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken. Harlow v. Fitzgerald. 457 U.S. 800.

The Supreme Court in Anderson set forth an example of a clearly established rule that must not be violated, to wit: "the right to due process of law is clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a (violation) violates clearly established rights.

The record contains sufficient evidence submitted by the petitioner to establish the absence of a genuine issue of material fact with respect to Bird's violation of petitioner's due process rights as clearly established by the Due Process Clause. Respondents failed to offer any evidence to counter petitioner's evidentiary material, and as a consequence summary judgment is proper in favor of the petitioner.

Moore's Federal Practice, 3d Ed., 56.1 [7] [b] observed:

> . . . the Supreme Court's Liberty Lobby opinion states that summary judgment is appropriate if the evidence is "so one-sided that only its movant can prevail" Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 250 (1986)

CONCLUSION

The Court should grant this petition and directly address and decide the issues presented below on the basis of the complete record in the appeal.

Respectfully submitted,

John R. Vintilla

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Tel. (440) 331-5484
Counsel for Petitioner

STATE OF OHIO)
) SS: AFFIDAVIT
COUNTY OF CUYAHOGA) RICHARD BIRD

Affiant, Richard Bird, after first having been duly sworn, deposes and states that:

)1) That he is the officer named as a defendant in the case of *Lucretia Vintilla v. City of Rocky River, et al*, United States District Court case No. 1:02CV2291;

(2) That he is a sworn officer in the Police Department of the City of Rocky River, Ohio and has served in that capacity since October, 1991. He graduated from the Ohio Peace Officer Training Academy in London, Ohio;

(3) That he is a graduate of Westlake High School and has taken courses at Cuyahoga Community College majoring in criminal justice and amassing approximately 117 credit hours;

(4) That since his initial training to become a sworn officer, he has attended a number of courses including being certificated in accident investigation which involved attendance at a one week course.

(5) That he recalls the incident set forth in the complaint and he actually investigated the accident. Affiant at that date, time and place was of the opinion that Mrs. Vintilla was absolutely the cause of the accident and he told her so. Notwithstanding Mrs. Vintilla's protestations to the contrary, Affiant believed that Mrs. Vintilla was the cause of the accident. Affiant then

took all the materials back to the station and thoroughly reviewed same. Upon his review, he exercised his discretion as a sworn officer under the laws and ordinances of the City of Rocky River, County of Cuyahoga, State of Ohio in the United States of America and issued a citation to Mrs. Vintilla.

(6) That it is his understanding that the issuing of a citation is not a finding by the Court or a conviction. That a party is entitled to dispute his decision to issue a citation and retain counsel and have the matter heard before a judge and jury. This procedure was available to this person and she disputed the citation which was her right;

(7) That at the time of the trial Mrs. Vintilla appeared with her husband appearing as counsel. That affiant had subpoenaed the other person involved in the accident. That her counsel represented that all damages to the other person involved in the accident had been paid and that the other person in the accident's vehicle had been repaired. That the other person involved in the accident verified his satisfaction as to the repair of his property damages;

(8) That the day of the said hearing/trial was a hectic one. That to his recollection the Court docket was full. The Court was crowded. Upon discussing the matter with all the parties involved he exercised his discretion to dismiss the case. The party suffering the property damage agreed since his vehicle was repaired by or on behalf of the Vintillas, affiant advised the prosecutor to dismiss the case. This the prosecutor did and the case was dismissed;

(9) That all documents he completed were documents required in the course of his duties. That many of them

are matters of public record and available to the public including insurance companies. That affiant made no contact with Mrs. Vintilla's insurance carrier and has no idea why the insurance carrier acted in the manner that it did. Affiant did nothing to cause Mrs. Vintilla's insurance premium to be increased or for the insurance company to cancel her insurance.

FURTHER AFFIANT SAYETH NAUGHT UNDER PENALTY OF LAW.

SWORN TO BEFORE ME and subscribed in my presence this _____ day of _____, 2004.

_____

NOTARY PUBLIC

(4)

Supreme Court, U.S.
FILED
OCT 2 2 2004
OFFICE OF THE CLERK

No. 03-1721

In The

Supreme Court of the United States

LUCRETIA G. VINTILLA,

Petitioner,

v.

CITY OF ROCKY RIVER, OHIO, R. BIRD,

Respondents.

On Petition ForWrit of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner respectfully moves this Court for an order (1) vacating the denial of the petition for writ of certiorari entered on October 4, 2004, and (2) granting the petition. As grounds for this motion, petitioner states the following.

Preliminary Statement

The Court of Appeals held that the "lower (district) court properly granted summary judgment in favor of Bird because he is entitled to qualified immunity." There is no proof in the record that the district court granted summary judgment in favor of Bird or for the other respondents either at their request or pursuant to and in compliance with the provisions of Rule 12(b)(6) and Rule 56, Fed. R. Civ. Proc.

The record does show that the district court denied petitioner's motion for summary judgment and that it granted respondents' motion to dismiss the complaint for failure to state a claim for relief. Accordingly, the court dismissed the complaint with prejudice. This is the extent of the district court's journal entries.

The record also shows that the lower court did not rule on substantial issues on appeal such as petitioner's motion for summary judgment, the section 1983 due process insurance question and the liability of the City of Rocky River under Brandon v Holt, 469 U.S. 464. The section 1983 substantive due process issue was mentioned cryptically. The court affirmed the dismissal of the Fourth Amendment claim for failure to allege it in the complaint, without affording the petitioner an opportunity to amend.

Petitioner believes that a scrutiny of the record and a review of the established relevant law vis a vis the conduct and actions of the lower court will demonstrate that the court has so far departed from the usual course of judicial proceedings as to warrant the exercise of this Court's supervisory powers.

PRIVATE CONTRACTUAL RIGHT CAN CONSTITUTE A PROPERTY INTEREST ENTITLED TO DUE PROCESS PROTECTION FROM GOVERNMENTAL INTERFERENCE UNDER FEDERAL CONSTITUTIONAL LAW

Petitioner's insurance company declared her at fault for the December 10, 2000 auto accident, cancelled her policy, and issued a new one at a substantial increase in the premium.

The uncontroverted evidence shows that Bird had caused the cancellation of the petitioner's policy and the subsequent increase in the premium by falsely declaring petitioner as the guilty party for the accident, and by placing that information in a sworn complaint which became a part of the official record of the court. In doing so, Bird made the information accessible and facially reliable to the insurance company and the general public. Had Bird not lied in stating that petitioner violated the law and caused the accident, there would have been no basis for the insurer to cancel the policy and to issue a new one with an increase in the premium.

The property interest which petitioner asserts she has been deprived of without due process derives from the insurance contract between her and the insurer. Petitioner has a contractual right to the stability of the insurance premium as agreed upon with her insurance carrier. The increase in the premium suffered by petitioner is due directly to Bird's unlawful action, and thus constitutes governmental

interference with a property interest entitled to due process protection under federal constitutional law. The district court disagreed, and the lower court ignored the issue.

Under Ohio law, the right to contract is a property right specifically guaranteed by the State Constitution. Mertik v Blalock, 983 F.2d 1353 (6th Cir. 1993). Joseph Bros. v Brown, 65 Ohio App. 2d 43; 415 N E 2d, 987, 990 (1979), held:

Brock v Roadway Express, Inc., 481 U.S. 252 (1987) makes clear that a private contractual right can constitute a property interest entitled to due process protection from governmental interference under federal constitutional law.

PROSECUTION WITHOUT PROBABLE CAUSE IS A CONSTITUTIONAL TORT ACTIONABLE UNDER SECTION 1983 IF THE CONDUCT WHICH PROMPTED THE PROCEEDING IS EGREGIOUS, ARBITRARY ABUSE OF GOVERNMENTAL POWER THAT SHOCKS THE CONSCIENCE.

The question presented is whether Bird's official conduct rose to the level required for a violation of substantive due process' guarantee under the Fourteenth Amendment? Stated otherwise, whether Bird's actions and behavior were so egregious that it may be fairly said to shock the conscience?

Officer Bird, who swore under oath to the criminal complaint that he executed and filed against the petitioner, either knew or should have known that he did not have probable cause against the petitioner, that an affidavit or a sworn statement can be executed only on personal knowledge of the factual statement or statements asserted, and that an untrue oath is perjurus.

As stated by Justice Stevens in his dissent in Albright v Oliver, 510 U.S. at 293: "...commencement of a serious criminal proceeding on such 'scanty grounds' is nothing short of 'shocking'". See n 5. Paraphrased for the instant case "... commencement of a serious criminal proceeding on 'perjured testimony' is nothing short of shocking".

At 295-296, he observed:

...The initiation of a criminal prosecution, regardless of whether it prompts arrest, immediately produces "a wrenching disposition of every day life" (citation omitted). Every prosecution, like every arrest, "is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends" (citation omitted).

At 299, Justice Stevens continues:

> Our cases make clear that procedural regularity notwithstanding, the Due Process clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence favorable to the accused.

And at 300 of the dissent, it is stated:

> Even if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony, or evidence on which "no rational trier of fact" could base a finding of probable cause, (citation reference omitted), simply does not comport with the requirements of the Due Process Clause.

The integrity of our judicial system is not helped by the tolerance of perjury by a law enforcement officer.

PETITIONER'S COMPLIANCE WITH THE COMMAND OF THE SUMMONS IN LIEU OF WARRANT TO APPEAR IN COURT TO ANSWER THE CHARGE FILED AGAINST HER CONSTITUTED A SEIZURE FOR PURPOSES OF THE FOURTH AMENDMENT

The district court held that since petitioner has not "alleged that she was seized", "she cannot establish a Fourth Amendment violation." The lower court agreed.

The appropriate response to the lower court's ruling that petitioner "cannot establish a Fourth Amendment violation" because she was not "seized" was given by Justice Ginsburg in her concurring opinion in Albright v Oliver, at 279, to wit: the fact the petitioner was not incarcerated to await trial,

> "... should not lead to the conclusion that a defendant released pretrial is not still 'seized' in the constitutional sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed 'seized' for trial so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence 'seized' for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court".

Petitioner's compliance with the command to appear in court to answer the charge lodged against her by Bird constituted a seizure for purposes of the Fourth Amendment

FEDERAL PRACTICE EXPRESSLY PERMITS AMENDMENTS TO CURE INADEQUATE JURISDICTIONAL ALLEGATIONS

The underlying rationale for the practice of permitting amendments to cure inadequate or defective pleadings was stated in .Foman v Davis, 371 U.S. 178, 181 (1962), as follows:

> The Federal Rules of Civil Procedure reject the approach that a pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleadings is to facilitate a proper decision on the merits. Conley v Gibson, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed to secure the just, speedy and inexpensive determination of every action. Rule 1.

The lower court held "Vintilla's malicious prosecution claim fails because she did not allege a Fourth Amendment claim".

Admittedly, petitioner did not specifically allege the Fourth Amendment as one of the federal constitutional rights that Bird had violated in his actions against her. However, the record contains sufficient undisputed evidence to show that petitioner is entitled to the protection of the amendment.

Petitioner is entitled to amend the complaint to conform to the undisputed evidence in the record that demonstrates the existence of a fourth amendment question

In Commercial Union Ins. Co. v United States, 999 Fed 2d 581, 585-586 (D.C. Cir. 1993), the court permitted

the plaintiff to amend to correct flawed allegations since federal jurisdiction was based on facts already in the record.

Wolf v Marsh, 846 F.2d 782 at 785, n. 4, states:

> (see generally 28 U.S.C. section 1653 allowing amendment of defective allegations as to jurisdiction at the appellate court level). It must be remembered that this is an exception to the rule that a complaint that does not properly allege the requisite jurisdictional elements is defective, subject to dismissal with leave to amend. The exception is permitted on grounds of judicial economy and to insure that plaintiff is not denied his day in court on the basis of technical flaws in the pleading.

This Court has held that plaintiffs, even at a late stage, would be entitled to amend their complaint, and the Court would treat the complaint to conform to the proof. Justice Stevens in Brandon v Holt,* 469 U.S. 464, 471 stated:

> Given this state of the record, even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact. (See n. 19 "amendment to conform to the evidence may be made at any time"). (Rule 15(b) amendment allowed "so long as opposing party has not been prejudiced in presenting his case"). (Rule 15(b) is "intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading

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* Whether the City of Rocky River is a proper party to this action has been answered by Brandon. Bird represents the City when he acts as a law enforcement officer of its police department.

skills of counsel"). See Schlesinger v Councilman, 420 U.S. 738, 744, n. 9.

The record reveals that petitioner was served with a Summons in Lieu of Warrant commanding her to appear before a Judge of the Rocky River Municipal Court to plead to the charge that she violated Section 331.1(a) of the City's Traffic Code and thereby caused an accident. The summons was provoked by and based on a false charge in a sworn complaint filed by Bird. In response to the summons, petitioner appeared in court with counsel and entered a plea of not guilty. The case was set for trial, at which time petitioner appeared in court with her lawyer prepared to defend against the charge. While awaiting the call to trial, Bird determined to dismiss and did dismiss the complaint on his initiative.

The lower court has held that petitioner cannot show a Fourth Amendment violation because she was not "seized". In Albright v Oliver, at 279, Justice Ginsburg dealt with this issue head-on, and held that a person's compliance with a summons in lieu of warrant to appear in court to answer a charge against him constitutes a "seizure" for purposes of the Fourth Amendment.

Clearly, petitioner is entitled to amend the complaint to conform to the proof in the record.

SUMMARY JUDGMENT IS APPROPRIATE WHEN THERE IS NO GENUINE DISPUTE OF MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

The district court denied petitioner's motion for summary judgment. The lower court did not consider the petitioner's appeal of the district court's decision on the issue.

Petitioner's motion for summary judgment was supported by the verified complaint affidavits, exhibits and brief pursuant to Rule 56, Federal Rules of Civil Procedure. The evidence proffered by the petitioner in support of the motion established the absence of a genuine issue of material fact. Respondents failed to present any evidentiary material to counter petitioner's evidence as required by Rule 56(e). This rule states: "...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.* (Italics supplied).

The record is devoid of any probative material presented by Bird to defeat petitioner's motion for summary judgment as required by Rule 56.

Petitioner submits that she has presented material facts which have not been genuinely disputed and that respondents have not met their burden of presenting appropriate evidence to create a genuine issue of material fact, making it necessary to resolve the dispute at trial.

CONCLUSION

The blatant violation of petitioner's property and liberty interests secured to her by the Constitution has been condoned by the lower court. A travesty of justice has occurred below.

The decision does violence to the established rules of law in refusing to right a wrong. It serves no valid purpose to allow an incorrect decision to remain in the body of law.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari,, petitioner urges the Court to grant the petition for a rehearing, to vacate its order of October 4, 2004 denying the writ, and to entertain the petition for a writ of certiorari.

Respectfully submitted,

John R. Vintilla
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I express a belief based on a reasoned and studied professional judgment that the petition for a writ of certiorari involves undisputed facts and issues of law which have been overlooked and/or misapprehended by this Court in considering and ruling on said petition. Therefore, petitioner requests a rehearing of the petition for a writ of certiorari for the reasons set forth in said petition.

I certify that the petition for rehearing is presented in good faith and not for delay.

Respectfully submitted,

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